

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

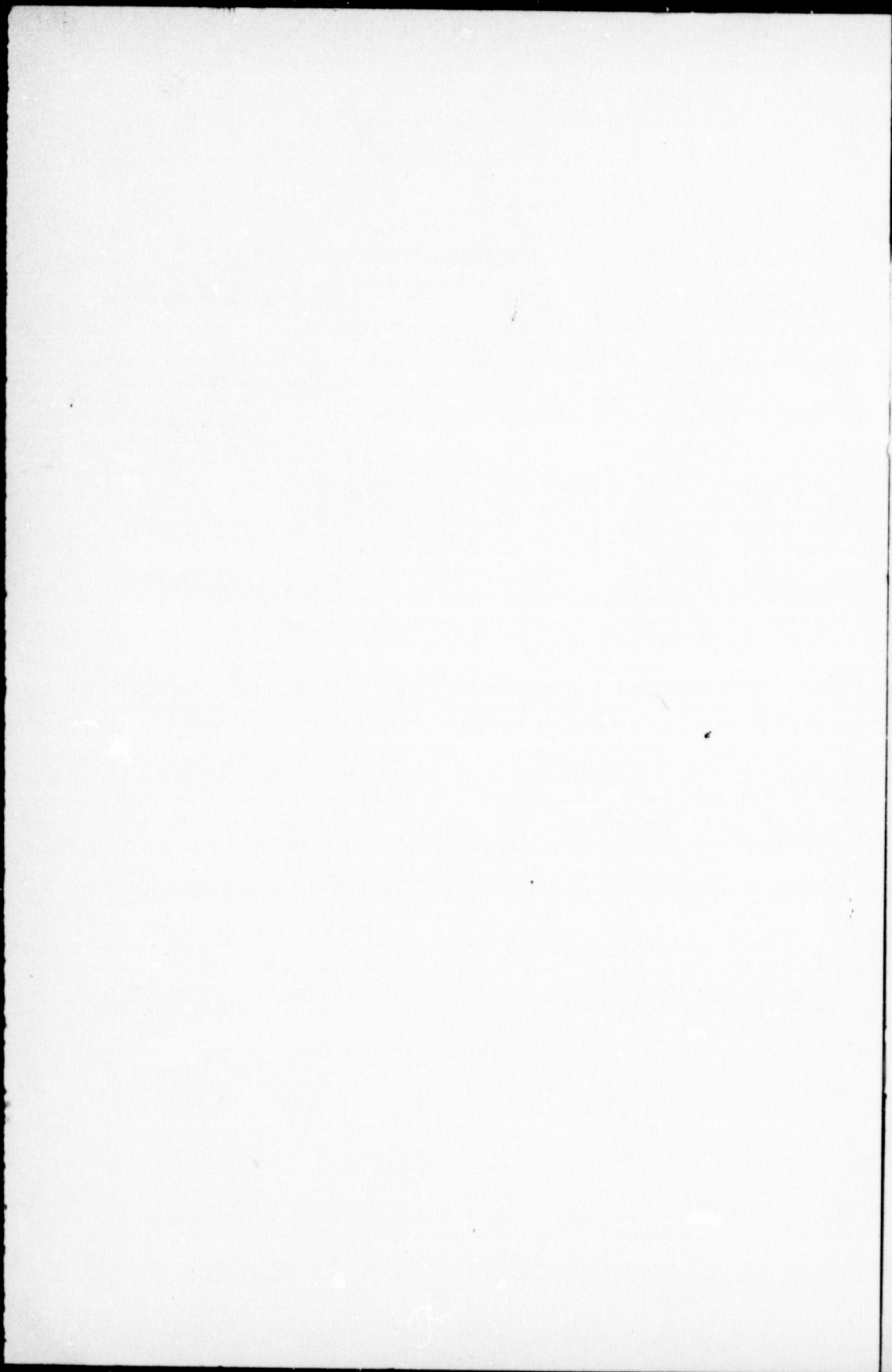


TABLE OF CONTENTS

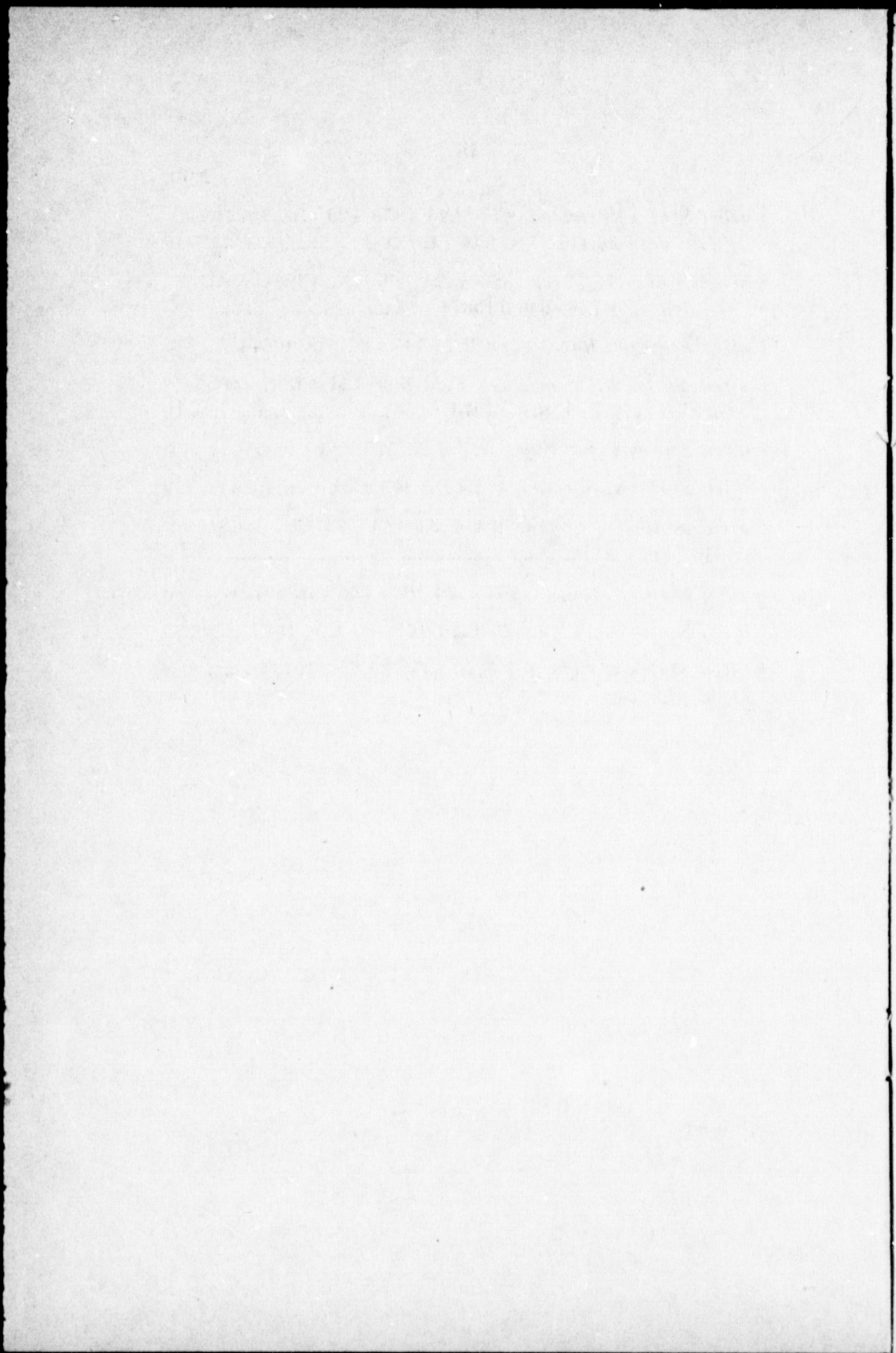
	PAGE
Preliminary Statement	1
The Suppression Hearing	2
ARGUMENT:	
POINT I—There was probable cause to arrest Durkin	5
POINT II—The bags in the back seat of the Volks- wagen were properly searched	7
CONCLUSION	11

TABLE OF CASES

<i>Aguilar v. Texas</i> , 378 U.S. 108 (1964)	5
<i>Carroll v. United States</i> , 267 U.S. 132 (1925)	10
<i>Chambers v. Maroney</i> , 399 U.S. 42 (1970)	10
<i>Chimel v. California</i> , 395 U.S. 752 (1969)	7
<i>Cooper v. California</i> , 386 U.S. 58 (1966)	10
<i>Draper v. United States</i> , 358 U.S. 307 (1959)	5, 8
<i>Spinelli v. United States</i> , 393 U.S. 410 (1969)	5
<i>United States v. Campos</i> , 255 F. Supp. 853 (S.D.N.Y.), <i>aff'd on the opinion below</i> , 362 F.2d 1011 (2d Cir. 1966)	5
<i>United States ex rel. Cardaio v. Casscles</i> , 446 F.2d 632 (2d Cir. 1971)	5
<i>United States v. Christophe</i> , 470 F.2d 865 (2d Cir.), <i>cert. denied as Panica v. United States</i> , 411 U.S. 964 (1972)	10

<i>United States v. Colbert</i> , 454 F.2d 801 (5th Cir. 1972), rev'd in banc on other grounds, 474 F.2d 174 (1973)	7, 9
<i>United States v. Colon</i> , 419 F.2d 120 (2d Cir.), cert. denied, 393 U.S. 1095 (1969)	5
<i>United States v. Dunnings</i> , 425 F.2d 836 (2d Cir. 1969), cert. denied, 397 U.S. 1002 (1970)	5
<i>United States v. Edwards</i> , 42 U.S.L.W. 4463 (U.S. March 26, 1974)	7, 9
<i>United States v. Evans</i> , 481 F.2d 990 (9th Cir. 1973)	9
<i>United States v. Francolino</i> , 367 F.2d 1013 (2d Cir. 1966), cert. denied, 388 U.S. 960 (1967)	10
<i>United States v. Frick</i> , 490 F.2d 666 (5th Cir. 1973)	8
<i>United States v. Garay</i> , 477 F.2d 1306 (5th Cir. 1972)	7
<i>United States v. Jenkins</i> , Dkt. No. 73-2414 (2d Cir., April 5, 1974)	7
<i>United States v. Johnson</i> , 467 F.2d 630 (2d Cir. 1972), cert. denied, 410 U.S. 932 (1973)	9
<i>United States v. Manarite</i> , 448 F.2d 583 (2d Cir.), cert. denied, 404 U.S. 947 (1971)	8
<i>United States v. Mancusi</i> , 432 F.2d 1046 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971)	8, 9
<i>United States v. Manning</i> , 448 F.2d 992 (2d Cir.) (in- banc), cert. denied, 404 U.S. 995 (1971)	6
<i>United States v. Maynard</i> , 439 F.2d 1087 (9th Cir. 1971)	8
<i>United States v. Mehciz</i> , 437 F.2d 145 (9th Cir.), cert. denied, 402 U.S. 974 (1971)	8

<i>United States v. Ortega</i> , 471 F.2d 1350 (2d Cir. 1972), cert. denied, 411 U.S. 948 (1973)	10
<i>United States v. Perry</i> , 380 F.2d 356 (2d Cir.), cert. denied, 389 U.S. 943 (1967)	5
<i>United States v. Ramos</i> , 380 F.2d 717 (2d Cir. 1967)	5
<i>United States v. Riggs</i> , 474 F.2d 699 (2d Cir.), cert. denied, 414 U.S. 820 (1973)	7, 8, 10
<i>United States v. Santiago</i> , 327 F.2d 573 (2d Cir. 1964)	5
<i>United States v. Soriano</i> , 482 F.2d 469 (5th Cir. 1973)..	7, 9
<i>United States v. Soyka</i> , 394 F.2d 443 (2d Cir. 1968) (in banc)	5
<i>United States v. Sultan</i> , 463 F.2d 1066 (2d Cir. 1972)....	5
<i>United States v. Valen</i> , 479 F.2d 467 (3d Cir. 1973)....	9, 10
<i>United States v. Vigo</i> , 487 F.2d 295 (2d Cir. 1973)	8



United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1207

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN DURKIN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John Durkin appeals from a judgment of conviction entered on January 17, 1974, in the United States District Court for the Southern District of New York, on his plea of guilty to both counts of Indictment 73 Cr. 925 before the Honorable Milton Pollack, United States District Judge.

Indictment 73 Cr. 925, filed October 1, 1973, charged in Count One that Durkin conspired with Charles Murray to distribute marihuana and possess marihuana with the intent to distribute it, in violation of Title 21, United States Code, Section 846; Count Two charged that Durkin and Murray possessed approximately 3600 grams of marihuana with the intent to distribute it, in violation of Title 21, United States Code, Section 841(a)(1).

On November 26, 1973, after a hearing before Judge Pollack, defendants' joint motion to suppress the marihuana was denied. Immediately thereafter, Durkin entered a plea of guilty to both counts of the indictment.*

On January 17, 1974, Judge Pollack sentenced Durkin on Count One to three months imprisonment, to be followed by two years special parole, and on Count Two to two years probation to run concurrently with the term of special parole.

Durkin is at liberty on bail pending appeal.**

The Suppression Hearing

Prior to trial, Durkin moved to suppress the marihuana seized at the time of his and Murray's arrest, and an evidentiary hearing was held on November 26, 1973, before Judge Pollack.

Special Agent Jeffrey Hall of the Drug Enforcement Administration ("DEA") testified that he had first met Daniel Miller,*** a registered DEA informant, in early August, 1973, in New York City. Miller had been arrested on narcotics charges in Miami, Florida, on August 1, 1973, and, after he had agreed to cooperate with the Government a few days later, Miller was brought to New York City and introduced to Hall (Tr. 4, 15, 50, 69).****

* At the time the plea was entered, the Government stipulated that Durkin would preserve his right to appeal from Judge Pollack's order denying the suppression motion.

** Murray was tried before Judge Pollack and a jury on November 26 and 27, 1973, and acquitted.

*** Miller's name was not revealed until after Hall testified; he was then produced at the defendants' request and testified at the hearing (Tr. 46-75).

**** "Tr." refers to the transcript of the suppression hearing, which is reproduced in Durkin's appendix.

Prior to August 14, 1973, Hall had met with Miller on five occasions and had received "tips" from him on seven or eight occasions (Tr. 5, 17). Each of the "tips" proved to be accurate, and Miller's information had already led to one arrest involving the seizure of forty kilograms of cocaine (Tr. 4, 28). By August 14, 1973, Agent Hall regarded Miller to be "absolutely reliable" (Tr. 5).

At about 3:00 P.M. on August 14, 1973, Miller called Agent Hall and told him that he had recently a man known to him as "Charlie", who had offered to sell him one hundred pounds of hashish. He gave Agent Hall a physical description of "Charlie" and "Charlie's" telephone number and told Hall that "Charlie" would be at Miller's house for further negotiations at 4:00 P.M., driving a yellow Volkswagen bearing a New York license plate 1931 LX (Tr. 5-6, 49).

After he received this information, Agent Hall immediately dispatched two of his fellow agents to initiate a surveillance of Miller's house (Tr. 6). Those agents reported back to Hall that at approximately 3:50 P.M. they observed a yellow Volkswagen parked in front of Miller's house. At 4:15 they reported that a man fitting "Charlie's" description left Miller's house, got into the Volkswagen, and drove away (Tr. 8).

Agent Hall also checked the telephone number Miller had given him and found it belonged to Charles Murray, a known narcotics violator (Tr. 7, 42). He also checked the license number of the Volkswagen Miller had given and found that the car was registered to Patricia Murray, the defendant's wife (Tr. 6).

At approximately 4:15 P.M. on August 14, 1973, Agent Hall received a second telephone call from Miller (Tr. 8). This time Miller reported that "Charlie" had disclosed his connection was going to arrive in New York City by train

that evening and that "Charlie" was going to pick him up at the station (Tr. 8, 50). Miller did not, however, specify which station (Tr. 64, 65).*

On the basis of the information which Hall received from Miller and from the agents who had had Miller's house under surveillance in the afternoon, Hall and a number of other agents established surveillance at Pennsylvania Station at approximately 8:15 P.M. on August 14, 1973 (Tr. 9).

Shortly after they arrived, the agents noticed "Charlie" sitting in the yellow Volkswagen at a taxi stand outside the station (Tr. 9). At approximately 8:40 P.M. John Durkin, the appellant, walked out of the station carrying a guitar case and a leather satchel (Tr. 10). After placing the satchel on the floor in the back seat of the yellow Volkswagen and the guitar case on the back seat, Durkin got into the passenger seat in front (Tr. 10, 22-24). When the Volkswagen had traveled several blocks from the station, the agents intercepted it and placed Durkin and "Charlie" under arrest (Tr. 10). The satchel and the guitar case were removed from the Volkswagen and, a minute or two after the arrest, were searched (Tr. 10, 38-39). The search revealed money and approximately thirty-six hundred grams of marihuana in the satchel; the guitar case contained a guitar (Tr. 11, 39).

At the conclusion of the suppression hearing, Judge Pollack denied the motions, finding "... ample probable cause for the arrest and search incident thereto" (Tr. 77-79).

* Miller and Hall had several additional telephone conversations later in the day, regarding details of the transaction not related to the meeting at the train station (Tr. 26-27).

ARGUMENT

POINT I

There was Probable cause to arrest Durkin.

The first of Durkin's two claims on appeal is that the agents lacked probable cause to arrest him. The contention is frivolous.

It is well established that probable cause to make an arrest may derive from uncorroborated first-hand information which law enforcement officers receive from a reliable informant. *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Draper v. United States*, 358 U.S. 307 (1959); *United States v. Sultan*, 463 F.2d 1066 (2d Cir. 1972); *United States ex rel. Cardaio v. Cassoles*, 446 F.2d 632 (2d Cir. 1971); *United States v. Dunning*, 425 F.2d 836 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970); *United States v. Colon*, 419 F.2d 120 (2d Cir.), *cert. denied*, 393 U.S. 1095 (1969); *United States v. Soyka*, 394 F.2d 443 (2d Cir. 1968) (in banc); *United States v. Ramos*, 380 F.2d 717 (2d Cir. 1967); *United States v. Perry*, 380 F.2d 356, 358 (2d Cir.), *cert. denied*, 389 U.S. 943 (1967); *United States v. Campos*, 255 F. Supp. 853 (S.D.N.Y.), *aff'd on the opinion below*, 362 F.2d 1011 (2d Cir. 1966); *United States v. Santiago*, 327 F.2d 573 (2d Cir. 1964). The familiar *Aguilar* test provides that information offered by an informant is sufficient to establish probable cause for an arrest if (1) there is some statement of the underlying circumstances from which the informant concluded the facts as he represented them to be to the law enforcement officers, and (2) there is some reason for believing the informant credible or his information reliable. Clearly, both prongs of this test were satisfied in the instant case. The informant told Hall that at approximately 8:00 P.M. on August 14, 1973, at a train

station in New York City, a man named "Charlie" would be meeting his connection who would be carrying one hundred pounds of marihuana. He told the agents his information came from direct negotiations with "Charlie" for the purchase of the marihuana. Prior to August 14, 1973, the informant had, on seven or eight occasions, provided the agents with information which proved reliable and which in one instance led to one arrest and the seizure of approximately forty kilograms of cocaine.

Moreover, many of the details of the information furnished by the informant were independently verified by the agents prior to the arrests. The telephone number and the automobile registration of "Charlie" proved to be for Charles Murray and Patricia Murray. The agents who conducted the surveillance of the informant's house on the afternoon of August 14 observed the yellow Volkswagen and saw it used by a man meeting the description of "Charlie" that the informant had furnished. At the railroad station the agents again saw "Charlie" and the Volkswagen as the informant predicted, and, according to the defendants' plan, Durkin came out of the station, put his luggage in the Volkswagen, and the defendants drove away. It is clear, therefore, that even if the reliability of Miller, the informant, had not been previously demonstrated, the independent corroboration by the agents of much of the informant's information prior to the arrests established the correctness and reliability of that information and gave the agents probable cause to arrest Murray and Durkin. *E.g., United States v. Manning*, 448 F.2d 992, 997 (2d Cir.) (in banc), *cert. denied*, 404 U.S. 995 (1971).

POINT II

The bags in the back seat of the Volkswagen were properly searched.

Durkin also claims that, regardless of probable cause, the agents should not have opened the bags that were in the back seat of the Volkswagen without getting a search warrant, relying on *United States v. Soriano*, 482 F.2d 469 (5th Cir. 1973); *United States v. Garay*, 477 F.2d 1306 (5th Cir. 1972); *United States v. Colbert*, 454 F.2d 801 (5th Cir. 1972), *rev'd. in banc on other grounds*, 474 F.2d 174 (1973). To the extent that these cases are apposite, they either support Judge Pollack's decision or differ from the law in this Circuit. In any event, for the reasons set out below, the claim is without merit.

The short answer to Durkin's contention is that, as Judge Pollack found, the search of the satchel was proper because it was incident to the arrest of Durkin and Murray. *Chimel v. California*, 395 U.S. 752 (1969). As the Supreme Court recently held, it is perfectly proper, incident to a lawful arrest, to search, either at the time of arrest or later, the person of an accused and "the property in his immediate possession" for ". . . weapons, instruments of escape and evidence of crime . . ." and to seize such items uncovered by the search. *United States v. Edwards*, 42 U.S.L.W. 4463, 4464-4465 (U.S., March 26, 1974). It can hardly be contended that a satchel on the floor of the back seat of a Volkswagen is not within ". . . the 'grabbing-distance'", as *Chimel* requires for a search incident to arrest, of a person sitting in the front seat. See *United States v. Riggs*, 474 F.2d 699, 704 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). Accordingly, the search of the satchel was properly incident to the arrest of Durkin and Murray. *United States v. Jenkins*, Dkt. No. 73-2414 (2d Cir., April 5, 1974),

Slip op. at 2716-2717; *United States v. Vigo*, 487 F.2d 295, 298 (2d Cir. 1973); *United States v. Riggs*, *supra*; *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971); *United States v. Mancusi*, 432 F.2d 1046, 1048 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971); *United States v. Frick*, 490 F.2d 666 (5th Cir. 1973); *United States v. Wilkerson*, 478 F.2d 813, 815 (8th Cir. 1973); *United States v. Maynard*, 439 F.2d 1087 (9th Cir. 1971); *United States v. Mehciz*, 437 F.2d 145, 146-148 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971).^{*} None of the Fifth Circuit cases on which Durkin relies assist him here. In *United States v. Soriano*, *supra*, the suitcases were in the trunk of the taxicab involved there and thus were not in grabbing distance of the persons inside the cab. In *United States v. Garay*, *supra*, the suitcases had been put on an airliner which the defendant was attempting to board when arrested. In *United States v. Colbert*, *supra*, the Court *in banc* did not decide whether the search there was incident to arrest, finding other grounds more agreeable. Finally, it is of no moment whether or not, as Durkin seems to emphasize, he

^{*} It is of significance that the Court in *Mehciz* relied in part on *Draper v. United States*, 358 U.S. 307 (1959). In that case, usually cited for the proposition that probable cause make an arrest may derive from an informer's tip, (See Point I, *supra* at p. 5), the narcotics agent learned from a reliable informant that a man would be arriving in Denver by train from Chicago and would be delivering a shipment of heroin. He was described in detail but not named. When Draper left the train, the agents saw that he conformed to the description they had been given. He was stopped, arrested and searched. The heroin was found in his hand and the needle (also introduced into evidence at his trial) was found during the course of an on-the-spot search of a small handbag which he was carrying and which was taken from him when he was arrested.

was in handcuffs when the satchel was opened.* *United States v. Edwards, supra*; *United States v. Mancusi, supra*.

Furthermore, even if the search had not been incident to arrest, under the circumstances the officers were entitled to make a warrantless seizure and search of the satchel, which was being transported on a public street in midtown New York, because they had probable cause to believe that it contained contraband. *United States v. Johnson*, 467 F.2d 630 (2d Cir. 1972), *cert. denied*, 410 U.S. 932 (1973), *United States v. Evans*, 481 F.2d 990 (9th Cir. 1973); *United States v. Valen*, 479 F.2d 467 (3d Cir. 1973). See also *United States v. Colbert, supra*, 474 F.2d at 178-179 (concurring opinion of Brown, Ch. J., and Coleman, Simpson, Clark, Ingraham, and Roney, C.JJ.).** The propriety of seizing the satchel cannot be disputed, and while, to be sure, in *Johnson* the police officers believed that the suitcase contained a shotgun which might be loaded, it seems clear that the right to search the suitcase there—as here—arose from the officers' right "to know what they were holding in their possession," 467 F.2d at 639, whether a weapon or narcotics; indeed, since the agents here reasonably believed that the satchel contained a substantial quantity of illegal narcotics, it was hardly inconceivable that the satchel also contained

* Agents Hall and Lightcap placed the two defendants under arrest while Agent Cremin seized the baggage (Tr. 10). Contrary to Durkin's assertion that "the suitcase were (sic) in the physical control of the agents while appellant was handcuffed in the rear seat of the Government vehicle" (Br. 13), Agent Hall testified that he couldn't recall whether the bags were opened at the site of the arrest, on the highway, or in the Government car (Tr. 39). Nor did he recall that the defendants were handcuffed when the satchel bag was opened (Tr. 43). Durkin did not testify.

** *United States v. Soriano, supra*, on which Durkin relies, would permit the seizure of the satchel here without a warrant, 482 F.2d at 472, but not its search. However, the Fifth Circuit has taken the case *in banc*, 482 F.2d at 481. We have been advised by the Clerk's office for that Court that the case was argued to the Court *in banc* on January 16, 1974, and is *sub judice*.

a weapon to protect the illegal contents. Cf. *United States v. Riggs*, *supra*, 474 F.2d at 705. Even without that possibility, however, the exigent circumstances and probable cause which gave the agents the right to seize the satchel reasonably believed to contain contraband also gave them the right to search it. *United States v. Evans*, *supra*; *United States v. Valen*, *supra*; see also Title 21, United States Code, Section 881(a); cf. *United States v. Francolino*, 367 F.2d 1013, 1018-1023 (2d Cir. 1966), *cert. denied*, 388 U.S. 960 (1967). There is no constitutionally meaningful difference between a warrantless seizure and the seeking of a warrant to search what was seized, and a warrantless seizure and concomitant search. *Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

Finally, it is also clear that the search here can be sustained because the agents had probable cause to believe that the Volkswagen contained contraband and were therefore entitled to search it and its contents, including the satchel, and seize such contraband as was found. *E.g.*, *Carroll v. United States*, 267 U.S. 132 (1925); *United States v. Christophe*, 470 F.2d 865, 868-869 (2d Cir.), *cert. denied* as *Panica v. United States*, 411 U.S. 964 (1972).^{*} Moreover, the same knowledge justified a forfeiture of the car, which also would have permitted a warrantless search of the car and its contents. *Cooper v. California*, 386 U.S. 58 (1966); *United States v. Ortega*, 471 F.2d 1350, 1360-1361 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973); *United States v. Francolino*, *supra*.

^{*} In this context, the facts of this case are remarkably like those of *Christophe*, which involved the search of an automobile and a suitcase found in its trunk.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ROBERT B. HEMLEY,
JOHN D. GORDAN III,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

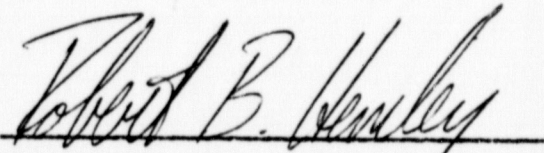
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ROBERT B. HEMLEY being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 12th day of April, 1974
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

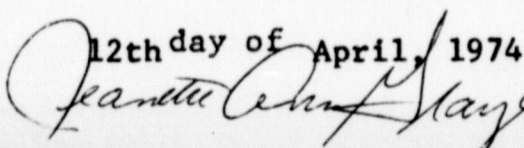
GEORGE E. GOLDSTEIN, ESQ.
327 South 17th Street
Philadelphia, Pennsylvania 19103

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for mailing
at the United States Courthouse, Foley Square, Borough
of Manhattan, City of New York.



ROBERT B. HEMLEY

Sworn to before me this

12th day of April, 1974


JEANETTE ANN GRAY
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975